

No.

IN THE
SUPREME COURT OF THE UNITED STATES

ROLANDO FELIX-CARRAZCO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

On Petition for Writ of Certiorari to the
Ninth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court should decide that the repeated questioning of jurors who have complained about one juror (who is obviously a holdout) is tantamount to the forbidden questioning in *Brasfield v. United States*, 272 U.S. 448 (1927) that the trial court may not inquire as to the numerical division of a jury when it is unable to reach a unanimous verdict.

RELATED PROCEEDINGS

United States District Court

United States v. Felix-Carrasco, CR-18-59-DAD (E.D. Cal.)

Ninth Circuit Court of Appeals

United States v. Felix-Carrasco, 19-10036

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Petitioner Rolando Felix-Carrazco respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit filed on May 14, 2020. The decision is unpublished.

OPINION BELOW

On May 14, 2020, the Court of Appeals entered its decision affirming petitioner's conviction for being a deported alien in the United States in violation of 8 U.S.C. § 1326(a) and (b)(2). (Appendix A [memorandum decision].) On May 26, 2020, the petition for rehearing was denied. (Appendix B.)

JURISDICTION

On May 26, 2020, the Court of Appeals denied the petition for rehearing. (Appendix B.) Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). This petition is due for filing on August 24, 2020. Supreme Court Rules 13(3). The order of March 19, 2020, extends that deadline to October 23, 2020. Jurisdiction existed in the District Court pursuant to 18 U.S.C. §3231 and in the Ninth Circuit Court of Appeals under 28 U.S.C. §1291.

CONSTITUTIONAL PROVISION INVOLVED

Sixth Amendment (pertinent part)

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury

STATEMENT OF THE CASE

A. The evidence against Petitioner consisted of nothing but documents

The government's prosecution of Petitioner for reentry after deportation [8 U.S.C. § 1326(a) and (b)(2)] rested entirely on documents from Petitioner's immigration file. Even the one testifying immigration officer who did encounter Petitioner had no recollection of him. In closing argument, defense counsel said that because "this is a document case" with no witnesses

to verify the information contained in those documents, I'm asking you to hold the government accountable. You are the gatekeeper. You are the ones who are going to decide whether or not you allow the government just to have a pass." (1 ER 159.)

Counsel analogized the situation to a contested a traffic ticket where an officer would come to court and read the ticket. However, this officer was not the one who calibrated the radar gun, did not personally see the driver of the car, and could not even identify the driver. "No. But the ticket says so. So therefore it must be true. ¶ That's really what the government's case is about if you think about it." (1 ER 144.)

Is it too difficult to get the people who actually prepared these documents to come in to the Court and to testify as to their personal knowledge? Maybe it is. Maybe they couldn't get those witnesses. But that's what their burden is. And you serve as the gatekeepers on the facts of the case. You decide what we're going to accept or what we're not going to accept in terms of proof beyond a reasonable doubt.

(1 ER 145.)

B. The district court removed Juror No. 7 after several jurors complained he wanted to see more evidence

The jury's first note after it began to deliberate was a request to see unredacted evidence from exhibits 1, 2, 3, 5, 9, 13, 14, 25, 32, and 33. The

court informed the jury that it could not provide that information and cautioned the jury not to speculate what had been redacted.

At the end of the first day of deliberations the jury said a unanimous verdict had not been reached and asked to recess. The next day the court informed the parties that a juror had called chambers and expressed concern that another juror was not following the instructions. The juror subsequently wrote a note that a juror was not following instructions about redacted information and was rejecting testimony “solely on the fact that ‘they are government.’” (1 ER 46, 187.)

The district court acknowledged that it could not inject itself into deliberations. It could reinstruct but feared the case was headed for a mistrial. Defense counsel thought that the note could be construed in different ways and perhaps it was a question of how the juror viewed the sufficiency of evidence.

The jurors were brought into the courtroom and the judge instructed that it could not delve into the deliberations. The court told them to follow all the instructions and not speculate. It had a duty to weigh all the evidence and decide the case solely on the law rather than sympathy.

After more deliberation the jury sent out another note stating that it could not come to a unanimous verdict because of the instruction to

disregard any evidence that had been stricken. The court said it could inquire juror by juror if someone was refusing to follow instructions but defense counsel objected to any further inquiry of the jurors as to any specific issues regarding deliberations.

The court decided to make further inquiries. The foreperson said there was one juror (No. 7) who was refusing to follow instructions. The court inquired of Juror No. 7 if that was true. Juror No. 7 denied that but said he could not elaborate given the instructions. The court told the parties it was concerned about Juror No. 7's demeanor but defense counsel objected to any further inquiry.

C. The court nevertheless asked more jurors about Juror No. 7, and they all characterized the dispute as to the evidence or the lack of it

The court said it would take a break but announced that it was going to make further inquiries and “if I get a majority of jurors saying yes, Juror 7 has affirmatively stated a refusal to follow the instructions,” the court would ask Juror No. 7 to explain. Then it would make a credibility determination. (1 ER 215.)

After the break, the court asked Juror No. 8 what Juror No. 7 said about not following instructions. Juror No. 8:

I can't remember specific statements, but there have been actions taken of refusal to express his own beliefs and be open to other beliefs. ¶ He refuses to even take a look at *the evidence* or try to understand other jurors' viewpoints. And he does not wish to express his own to us. He simply shuts the other viewpoints out.

(1 ER 217, emphasis added.) The court commented this sounded like a refusal to deliberate. (1 ER 21.)

Juror No. 8 said that after the first question about the redactions, Juror No. 7 said the "instructions mean nothing to him and they do not pertain to his viewpoints. ¶ Even though other jurors have argued that they specifically do, he does not accept the instructions as being as such." (1 ER 217-218.) "He has stated that based on the redactions, he cannot trust the system under which we are under oath to work in." (1 ER 218.)

After Juror No. 8 left the courtroom the court said it doubted whether Juror No. 7 would abide by any instructions. The redactions were made to protect the defendant from prejudicial information. (1 ER 219.) The government suggested making inquiries of Juror No. 2 to see if he would corroborate Juror No. 8. (1 ER 220.)

Defense counsel said that after listening to Juror No. 7, it did not seem like a refusal to deliberate but rather he "has deliberated" and he is a "holdout juror." (1 ER 220.) The juror has "made an opinion of whether or not

he thinks the government has proven its case, one way or another, and has deliberated and expressed his opinions.” (1 ER 221.)

The court disagreed, believing it was clear from the foreperson’s point of view that this was not about differences of opinion regarding the evidence but a refusal by one juror to follow the instructions. (1 ER 223.) The court made further inquiries:

- Juror No. 2 said that after the court clarified redacted information was not part of the evidence, “one of the jurors said that he rejected that because you are the government, and he did not care if the defense lawyer has chosen not to bring it up or not, because of distrust.” (1 ER 224.) He was not “looking at *any of the evidence*” because of the redaction. (1 ER 225, emphasis added.)

- Juror No. 12 said of Juror No. 7, “there is not acceptance.” (1 ER 227.) “There is reluctant [sic] to *accept the evidence presented*.” (1 ER 227, emphasis added.) Juror No. 7 said “he is not going to consider the evidence due to — he — the need of being [to] disclose *more evidence*.” (1 ER 228, emphasis added.) “There is a belief that we should be allowed to look at more evidence that has not been disclosed to us.” (1 ER 229.)

- Juror No. 11 said that statements by Juror No. 7 in regard to not following the instructions, “was along the lines of distrust in the

government” and “a questioning of the redacted information.” (1 ER 231.) Because the jury was not allowed to see the redacted information, “this juror is not able to see past that and unable to consider the *evidence that was presented.*” (1 ER 232, emphasis added.) Without being able to see the redacted information, “this juror was, in my opinion, not willing to consider anything else, and *would not allow us to move forward in reaching a unanimous decision.*” (1 ER 233, emphasis added.)

The court said that after hearing from these four jurors, whose responses were “quite consistent,” it believed that Juror No. 7 “is refusing to accept and follow the Court’s instruction that the redacted information is irrelevant to the issues before the jury.” (1 ER 234.) At that point, “the only thing for me to do is to inquire once again with Juror Number 7 directly as to whether that in fact is the case.” (1 ER 234.) If he agrees, then the court would inquire if he will reconsider and follow the instructions. If he disagrees the court would make a credibility determination. (1 ER 234.)

The government agreed with the court’s approach, but defense counsel reiterated he had stated his objections. However, if the court was going to bring in Juror No. 7, they should decide what to do after he speaks. (1 ER 235.)

D. When the court again inquired of Juror No. 7 whether he was refusing to follow instructions, he responded that he had “a doubt” about the case

Juror No. 7 was brought back into the courtroom. The court summed up the jury notes and instruction that they were to disregard the redactions and not speculate about the redactions. *The Court*: “It has been reported to the Court that you are refusing to follow that instruction.” (1 ER 236.) “I will ask you, sir, are you refusing to follow the Court’s instruction as embodied in its answer to the jury’s inquiry?” (1 ER 236-237.) *Juror No. 7*: “No.” *The Court*: “Several of your fellow jurors have reported that that is precisely what you are doing ...” *Juror No. 7*: “Without going into our deliberation process, I can’t answer that.” *The Court*: I think it is a ‘yes’ or ‘no’ answer. *Juror No. 7*: “I disagree.” (1 ER 237.)

Juror No. 7 conceded that he had wanted to see the redacted information before making a decision. When the court reminded him of the instruction to disregard it and not speculate, the juror answered:

I find it very difficult to come to a decision about my feelings about the guilt or not guilt with those instructions. It seems to inhibit my ability to weigh the entire totality of the government’s case against the individual.

(1 ER 238.)

When the court said it sounded like he was saying he cannot follow the instruction. *Juror No. 7*: “That’s up to you.” (1 ER 238.) The court again said it sounded like he was saying he could not disregard the redaction. Juror No. 7, responded:

I’m saying it is very difficult. My instructions were to evaluate all the evidence and come, if there was no doubt in my mind, without any doubt in my mind, one way or the other.

And it is impossible for me to come to that point in deciding one way or the other, *so a doubt has been created*. And that’s my basis for asking for more information. And if the information doesn’t come – if you have restricted that, then that’s – you have restricted me from being able to make a decision. So.”

(1 ER 239, emphasis added.)

The court again asked the juror if he was refusing to follow the instruction. The juror responded:

I’m saying it makes it impossible for me to make an objective decision. The Court is making it impossible for me to come to a conclusion that would be objective. And so I have a question of – *there is an element of doubt* that I have to, in all good consciousness [sic], insist that it be taken into account.

(1 ER 239, emphasis added.)

The court: You are refusing to follow the Court’s instruction?

Juror No. 7: “Again, I keep saying this. Information is being withheld from me as a juror, and if the information is being withheld, I can’t make a

decision one way or the other.” *The court*: Even though I have instructed you to disregard it? *Juror No. 7*: “Of course.” (1 ER 240.)

E. Defense counsel argued that Juror No. 7 had simply found the evidence to be insufficient but the court disagreed and excused him

The government said it was “pretty clear” that Juror No. 7 was refusing to follow the instructions of the court. (1 ER 240.)

Defense counsel disagreed. “I read that juror to be saying that, based upon the evidence that’s been presented at this point in time, he has insufficient evidence before him in order to make a finding one way or the other.” (1 ER 240-241.) He was saying that if he had the missing information, that might allow him to be persuaded one way or the other; but he was not saying that he refused to deliberate or refused to follow the court’s instructions. (1 ER 241.) The juror had “questions or concerns about the state of the evidence if it doesn’t include the redacted portions of the materials.” (1 ER 242.) “Which to me means that there is – without that information, there is insufficient evidence for him to make that decision.” (1 ER 242.)

The court ruled that it would remove Juror No. 7, relying primarily on *Christensen*, 828 F.3d 763. “I have tried to take precautions to restrain my inquiry and conclude, based upon the statements of the other

jurors, that Juror Number 7 has refused, due to his disagreement with the Court's instructions" to follow the instruction. (1 ER 243-244.) This was "completely and totally unrelated to any position on the merits of this case or legitimate views or truly-held views as to the evidence." (1 ER 244.) The court found good cause under Rule 23(b) to excuse the juror. (1 ER 244.)

Defense counsel refused to proceed with a jury of 11. The court excused Juror No. 7, and called in the alternate, Juror No. 15. (1 ER 245.) The newly constituted jury returned a guilty verdict in about twenty minutes.

F. The Ninth Circuit affirmed without acknowledging that Juror No. 7 repeatedly said he was concerned about the evidence – or lack of it

The memorandum decision failed to mention that Juror No. 7 did exactly what defense counsel asked him to do. The memorandum decision failed to acknowledge that the juror's concerns were related to evidence – or lack of it.

The memorandum decision upheld the district court's decision to remove Juror No. 7, stating that he only made a "passing reference" to the state of the evidence. (Appendix A at 3.) However, Juror No. 7 in fact stressed several times that because information had

been withheld from him he had a reasonable doubt. This is exactly what defense counsel asked him to do – hold the government accountable in a case based solely on documents.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD PROVIDE GUIDANCE TO THE LOWER COURTS AS TO HOW FAR A COURT MAY DELVE INTO JUROR DELIBERATIONS WHEN THERE IS ONE HOLDOUT JUROR

A. The Ninth Circuit has held that when the record discloses any reasonable possibility that the impetus for a juror's dismissal stems from the juror's views on the merits of the case, the court must not dismiss the juror

The leading Ninth Circuit case regarding the district court's responsibilities when deciding to dismiss a juror during deliberations after other jurors complain is *United States v. Symington*, 195 F.3d 1080, 1084 (9th Cir. 1999). The district court acknowledged this case but said it was relying on *United States v. Christensen*, 825 F.3d 763, (9th Cir. 2016) when it excused Juror No. 7. (1 ER 88, 243-244.) Because Felix-Carrasco's case is akin to *Symington* and not *Christensen* it is important to discuss both cases in some detail.

1. *Symington*

Symington was tried for false statements and wire fraud. After several days of deliberation, a juror sent out a note which said that one juror "has stated their final opinion prior to review of all counts." *Symington*, 195

F.3d at 1083. After discussing the note with the parties, the court instructed that the jurors were to deliberate with each other but make up their own mind. *Ibid.*

In a second note, a juror complained about Juror Cotey for not being focused, inability to recall topics under discussion, refusal to discuss views with other jurors, and inability to understand the discussions. The court and the parties spoke to other jurors, but not Juror Cotey, and they agreed with this assessment. One juror said Cotey was “very intelligent” but had her mind set. *Id.* at 1084. Other jurors indicated that they were frustrated with Cotey’s disagreement on the merits of the case. Another juror indicated that Cotey was an obstacle to reaching a verdict. *Ibid.*

When the judge questioned Cotey herself, she said she was prepared to continue deliberating but could not agree with the majority all the time. She found herself “backed up against the wall for a vote every time” and she “didn’t like being bullied.” *Ibid.* She became intimidated when everyone talked at once and demanded she justify her views as soon as she said them. *Ibid.*

The district court decided to dismiss Cotey because she was “either unwilling or unable to deliberate with her colleagues.” *Ibid.* The court replaced Cotey with an alternate. The next day Symington moved for a

mistrial on grounds that the disagreement was rooted in the merits of the case. The motion was denied. The jury ultimately convicted of Symington of seven counts, acquitted him on three counts, and hung on eleven counts.

The Ninth Circuit reversed, holding that removing a juror because he is unpersuaded by the government's case denies the defendant the right to a unanimous verdict. *Id.* at 1085. When a request by other jurors that a juror be dismissed because they disagree with her on the merits, the judge must either declare a mistrial or send the jury back with instructions to continue deliberating. *Id.* at 1085-1086.

The primary question was “how likely must it be that a juror’s views on the merits underlies the request for her removal, before the district court is precluded from removing the juror?” *Id.* at 1086. A judge is precluded from delving deeply into a juror’s motivations because he cannot intrude into the jury’s deliberations. *Id.* citing *United States v. Brown*, 823 F.2d at 596.

A court cannot second guess and influence the work of the jury; nor can it expose the deliberations to public scrutiny. *Id.* citing *United States v. Thomas*, 116 F.3d 606, 620 (2nd Cir. 1997). These limitations make it difficult to ascertain whether a juror is unwilling to deliberate or simply disagrees with other jurors on the merits. Therefore:

We hold that if the record evidence discloses any reasonable possibility that the impetus for a juror’s dismissal stems from the

juror's views on the merits of the case, the court must not dismiss the juror. Under such circumstances, the trial judge has only two options: send the jury back to continue deliberating or declare a mistrial.

Symington, 195 F.3d at 1087.

“To remove a juror because he is unpersuaded by the government's case is to deny the defendant his right to a unanimous verdict.”

Symington, 195 F.3d at 1085, citing *Thomas*, 116 F.3d at 621.

While there may have been some reason to doubt Cotey's abilities as a juror, “there was considerable evidence to suggest that the other jurors' frustrations with her derived primarily from the fact that she held a position opposite to theirs on the merits of the case.” *Id.* at 1088. Some jurors' complaints indicated that Cotey was preventing them reaching a verdict. Cotey said that she could not “agree with the majority all of the time.” *Ibid.* Since it was reasonably possible that because the impetus for Cotey's dismissal was due to her position on the merits of the case it was error to dismiss her. *Ibid.*

2. *Christensen*

Christensen was tried with several other defendants for engaging in illegal wiretapping during private investigations. A divided court upheld the dismissal of Juror No. 7 in *Christensen* after several notes from the jury complained about a juror that suggested he was unwilling to follow the law

because he disagreed with it. After questioning the particular juror, the court determined that he would not follow the law and that he had lied to the court. Under Rule 23(b), an intentional disregard of the law, “often in the form of juror nullification, can constitute good cause for dismissal of the juror.” *Christensen*, 828 F.3d at 806.

Lying to the court about matters related to potential bias may also constitute good cause. “We afford ‘special deference’ to a trial court’s adverse credibility finding because the determination of credibility is ‘largely one of demeanor.’” *Id.* at 808 (citation omitted). When there is a possibility the juror has lied, the district court will “not always suffer from the same lack of investigative power that limits the court’s ability to inquire into problems among deliberating jurors.” *Ibid.*

In *Christensen*, Juror No. 9 accused Juror No. 7 of disagreeing with the law, allegedly saying that if it is okay for the government to wiretap and not get caught then it is okay for him. Juror No. 9 sent another note accusing Juror No. 7 of saying “in the law we don’t have to pay federal taxes, just state taxes.” *Id.* at 809.

When questioned, Juror No. 7 denied that he had made those statements. The complaining juror was angry because he disagreed with the majority. *Id.* at 810. The court then questioned five other jurors who

confirmed that Juror No. 7 said if the federal government could do it and not be found guilty, then a private citizen shouldn't be found guilty. *Ibid.*

The Ninth Circuit found that because five other jurors contradicted Juror No. 7 when he denied making statements about the validity of wiretapping, the district court's finding that Juror No. 7 had lied was not clearly erroneous. *Id.* at 811. "Under these circumstances, it appears to us highly unlikely that the other jurors were motivated by Juror 7's disagreement with their views on the merits." *Ibid.* "All of the concerns expressed by the other jurors related to Juror 7's views on the law, not the evidence." *Id.* at 811-812.

B. This Court should grant certiorari to provide guidance to the lower courts about how far a trial court may delve into the deliberations before removing a holdout juror

Although the Ninth Circuit has laid out rules for district courts to follow when deciding to remove a juror during deliberations, this Court has not done so. It has held that when a federal jury is unable to render a unanimous verdict the judge may not make inquiries as to the numerical division even if it does not ask how many for or against conviction. *Brasfield v. United States*, 272 U.S. 448, 449-50 (1927). This Court, however, has not

definitively held how far the district court may go in making inquiries of a jury when there is one juror who appears to be the holdout.

In this case, other jurors complained that Juror No. 7 was refusing to follow instructions (not to speculate about redacted information) but the court's colloquy with this juror revealed that he had a doubt about the sufficiency of evidence to convict. He did say that he was concerned that information had been withheld from him but stressed that this therefore created a doubt about the government's case.

The lower courts are in much need of guidance as to how far a trial court may go in making inquiries of the jurors when they have complained that one juror is not on the same page as everyone else. Here, the district court made inquiries of numerous jurors before it removed Juror No. 7. The issue is, at what point does the district court intrude into deliberations by its *repeated* questioning of the jurors as to the basis for their disagreement with the holdout who is preventing the return of a unanimous verdict.

Although the district court did not ask what the numerical division was as in *Brasfield*, the court's repeated questioning was tantamount to the same thing, or even worse. It was obvious that Juror No. 7 was leaning towards an acquittal and the other eleven jurors were going to vote guilty.

This case is the perfect vehicle to lay down some guidelines for the lower courts to follow.

CONCLUSION

For the reasons expressed above, Petitioner respectfully requests that a writ of certiorari issue to review the judgment of the Ninth Circuit Court of Appeals.

Date: July 13, 2020

Respectfully submitted,

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